

DUPLICATE

RECEIVED

MAY - 9 1989

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In re Application of )

CAPROCK EDUCATIONAL BROADCASTING )  
FOUNDATION )

) File No. BMPED-880328MM  
)

) For Modification of Construction Permit )  
) KAMY, Lubbock, TX )

To: Chief, Mass Media Bureau

OPPOSITION TO PETITION TO DENY

Caprock Educational Broadcasting Foundation ("Caprock"), its counsel, herewith submits its opposition to the PETITION TO DENY filed by Williams Broadcast Group ("Williams") in the above-captioned proceeding. In support whereof, the following is stated:

1. Williams states in its Summary that Caprock has violated the Communications Act and the Commission's Rules by building its FM station in Lubbock, TX prematurely, and that it "commenced full-scale operations, signing off only after demands from Williams to the Commission -- and for that matter -- Capitol Hill that the unauthorized operations be terminated."

2. Caprock acknowledges that it commenced operations at the site proposed in its pending application for modification of construction permit prior to receiving a grant of that application. As indicated in the attached Declaration of T. Kent Atkins, Trustee of Caprock, the applicant proceeded with construction under the mistaken belief that it would lose its permit if it did not place the station on the air prior to the

MAY 10 10 34 AM '89  
AUDIO SERVICES  
DIVISION

mistakenly believed that its application was for a minor modification and that construction in accordance with the minor modification was permissible.

3. Contrary to the assertion of Williams, Caprock ceased operations of its own volition and not as a result of Williams' "demands" to the Commission and Capitol Hill. In fact, Caprock had no knowledge that Williams had filed any type of complaint until after it ceased operations. As stated in the attached Declaration, at para. 15:

15. Caprock became aware that its construction was unauthorized following a call from Mr. Arthur Doak of the Commission who asked for information regarding the location and power of the KAMY facilities. Caprock called counsel regarding the request and to provide the information. It was at this time that counsel advised Caprock that it should not be operating until it received a grant of the modification application. Caprock immediately took the station off the air, and counsel advised Mr. Doak that the applicant had mistakenly commenced operation at the proposed location but had ceased operations immediately upon being notified of its mistake.

4. Caprock did not receive a copy of the Williams complaint until after the petition to deny was filed. A copy was sent to Caprock by Dennis Williams on April 25, 1989. A copy was also sent to counsel upon request. While the complaint indicates that a courtesy copy was sent to KAMY, none was received. The address to which said copy was sent is not indicated, and Caprock has no way of knowing whether a correct address was used.

5. In any event, Caprock acknowledges that it built the station at its proposed new location rather than that authorized in its construction permit. However, Caprock did have an application on file (the instant application) for modification of construction permit and mistakenly built the facilities proposed

in the modification application. It did so without consulting counsel. Caprock now understands that this is a serious violation and wishes to apologize to the Commission.

6. Although Caprock did mistakenly violate the Commission's rules by building its station prior to receiving a grant of the instant application, the only harm which has been alleged by Williams is to its own private commercial interests. The violations were the result of the applicant's attempt to place the station on the air prior to expiration of the construction permit (which in and of itself was in furtherance of the public interest), and the public has not been harmed by the actions of Caprock.

7. Furthermore, the Williams Petition to Deny is fraught with errors which distort Caprock's admitted violation out of proper proportion. The numerous errors contained in the petition begin with the opening statement in which Williams refers to "the 30 months following grant of its original construction permit." As indicated in the attached Declaration, it has been only 18 months since the grant of the construction permit. Moreover, it has been over a year since Caprock first filed to modify its proposal. Thus the charge on p. 2 of the petition that Caprock has lacked diligence in building its facility is not true.

8. Williams' statements in regard to its status as a party in interest are also distorted. Since KJAK is a commercial station and KAMY is a noncommercial station, the stations will not compete in the normal sense of that term. Furthermore, the allegation that KAMY's operation creates "unfair competition" is

totally unsupported. While operation at this time is impermissible because the Commission has not authorized operation, there is nothing intrinsically unfair about the proposed operation of KAMY.

9. On p. 5 of its pleading, Williams refers to an alleged conversation with the Chief Engineer of KJTV, which controls the antenna site for the KAMY antenna. The statements contained in this portion of Williams' pleading are self-serving hearsay. If Mr. Smith believed that something "unlawful" was taking place, he certainly did not communicate that fact to Caprock or the Commission. In any event, the antenna was placed on the tower in mid-March. Therefore, the claims by Mr. Dulaney that construction was observed in February are inaccurate. Indeed, as indicated in para. 7 of the attached Declaration, some of the equipment allegedly seen on the tower in February was not even purchased until mid-March.

10. While the allegations are true that KAMY went on the air in April, the allegations regarding the power being utilized by KAMY are totally erroneous. As indicated in the attached Declaration of Mr. Atkins, at para. 8, there is a 10,000 watt CCA transmitter which is being stored in the KAMY transmitter building. However, the transmitter lacks essential parts necessary to be operational and could not have been placed in use by KAMY at this time. As further stated by Mr. Atkins:

9. Caprock categorically denies that it ever operated above the requested power of 1.112 KW. The transformer taps on the 1000B ITA(Wilkinson) were set back to put a total of 256 watts of power out to the coaxial cable. With the length of coaxial cable and the eight bay antenna this would have made our maximum effective radiated power 1.112 KW requested from the Commission

on July 28, 1988.

10. Williams states that they made informal tests and determined that KAMY was "putting out approximately 25,000 watts. It would be impossible for an ITA(Wilkinson) 1000B to put out 25,000 watts even through an eight bay antenna.

11. On p. 7, Williams asks that the death penalty be imposed against Caprock, noting that according to the Caprock application, it is represented by counsel. While undersigned counsel is the attorney of record for Caprock, the fact is that Caprock never consulted undersigned counsel regarding its filings with respect to KAMY or its construction of the facility. Counsel was consulted only following the call from Mr. Doak of the Commission. However, in light of the fact that Williams was aware of the listing of counsel in the application, Williams' failure to serve a copy of its complaint in this matter on counsel raises a serious question as to its purposes in the filings which have been submitted in this proceeding. The fact is that the complaint was never received by either Caprock or undersigned counsel. Had it been received, Caprock would have discontinued operations immediately.

12. On p. 8, Williams states that Caprock illegally operated its station "without a permit, much less a license." As Williams well knows, a station may be operated pursuant to program test authority without a license. As indicated in Exhibit 1 hereto, Caprock sent a telegram to the Commission, notifying it of the commencement of operations. While it is true that this telegram was not an effective vehicle for obtaining program test authority because the applicant had not built in accordance with its outstanding construction permit, the fact

that such a telegram was sent clearly indicates that the applicant was not attempting to hide anything from the Commission. It made an honest mistake. When it was apprised of the mistake it discontinued operations.

13. Next, on p. 9 of its petition, Williams states that Caprock violated the rules by failing to give public notice of its major change application. As indicated in the attached Declaration, the applicant believed that the application was for a minor modification, and it was never advised otherwise by the Commission. No public notice is required for a minor modification application. The applicant is currently making arrangements for publication in the local newspaper.

14. With respect to the charges of premature construction, the fact is that Caprock did have a construction permit to build the station and had filed for modification of the construction permit. The applicant made a mistake in building at the new site prior to grant of the modification. However, this was not a willful violation of the Act. The applicant proceeded with construction to avoid losing its permit which was about to expire. The applicant was wrong in doing these things and wrong in not seeking advice of counsel. However, this does not translate to the "willful" violation which Williams charges. Furthermore, no allegation has been made that operation as proposed would somehow be contrary to the public interest. Williams has not challenged the underlying application which is at issue here as being somehow unacceptable.

15. On p. 10, Williams refers to Caprock's violations of

the Commission's Rules, beginning with that of operating in excess of its permissible effective radiated power. As already indicated, KAMY was not operating with power above that requested in its application for modification of construction permit. The charge regarding failure to publish has previously been treated as has been the issue of the applicant's notification to the Commission that it had commenced operations. The applicant is not clear what Section 1.65 violation it is being charged with by Williams. It clearly did notify the Commission when it commenced operations, and it clearly had filed for a modification of its facilities in which it noted that it could not build at its original site.

16. Finally, Williams asks for the death penalty against Caprock. It asks for imposition of the maximum fine and forfeiture of the construction permit. However, the sole basis for imposition of these drastic penalties is that Caprock will compete with Williams. It is quite obvious that Williams is far more concerned with protecting its own competitive position (whatever that might be) than serving the public interest.

17. In Patton Broadcasting Corp., 81 FCC 2d 336 (1980), cited by Williams in its petition, the Commission stated that "it would be anomalous to interpret Section 319(a) in a context that may hinder a permittee from complying with Section 319(b) with respect to required dates of commencement and completion of construction." Just such an anomalous situation arose here since Caprock was attempting to build its station before its outstanding construction permit expired.

18. While Caprock acknowledges that premature construction

is proscribed by the Act, Caprock does not believe that the cases cited by Williams are directly apposite to the facts of this case. In the instant case the applicant did have a valid construction permit to build the station (albeit at another site). In contrast, Section 319 was designed to prohibit construction where an applicant had no construction permit and was attempting to pressure the Commission into granting a license based on the existing construction.

19. Construction of the instant station was authorized, but the applicant could not build at its original site. Consequently, this case is analogous to those cases in which an applicant builds but has made a mistake in the coordinates or some other detail of the construction permit. The applicant may be required to cease operations, but it is permitted to file an application for modification of construction permit. There is no revocation of the permit in such cases where an applicant does have an outstanding permit but failed to build in compliance therewith. The applicant is required to wait until its modification application is granted before commencement of operations at the facility which has been built.

20. Furthermore, Caprock is constrained to point out that Williams does not come to the Commission with "clean hands." According to its own affidavits, Williams knew as early as January of this year that Caprock was building its station at the wrong site. However, it never notified Caprock or the Commission to abort this allegedly "unlawful" behavior. Apparently, Williams was more interested in building a case against Caprock



so that it could destroy its "competition" than it was in stopping the "unlawful" behavior. [Perhaps Williams was waiting for Caprock to spend as much money as possible before notifying the Commission so that the damage to Caprock would be greater].

21. If Williams were truly interested in assuring that the Commission's Rules would not be violated, it would have notified Caprock and the Commission back in January of the violation. Williams' actions in waiting until the time for filing a petition to deny to report the violations clearly indicates that its motive in this matter has been purely to destroy a potential competitor and has nothing whatever to do with the public interest. Had Williams reported this matter when it first became aware of it, KAMY would never have been built and placed on the air improperly. When it was within its power to keep this violation from happening, Williams chose instead to let the construction go forward so as to enhance its case against a potential competitor.

22. In conclusion, Caprock admits that it made a mistake in building at its proposed new site prior to receipt of a grant of its modification application. However, the public interest would not be served by imposing the death penalty as proposed by Williams. The only injury caused by the violation is to the alleged competitive interests of Williams. However, the violation could have been avoided if Williams had notified Caprock and the Commission when it first learned that Caprock was building at an unauthorized location.

23. If sanctions are to be imposed here, they ought to be imposed equally against Williams. By its own admission Williams

became an accomplice to what it understood to be "unlawful" construction when it failed to report the matter to the Commission. Indeed, Williams' actions in concealing knowledge of a violation from the Commission must be viewed as more serious than the actual violation since the actions of Williams were clearly "willful," and Williams had an obvious improper "motive" for its concealment of facts. Williams was not interested in stopping the unauthorized construction. It was interested in gathering facts to destroy a competitor. Such actions by Williams should not be tolerated.

24. Williams could have prevented the violations about which it complains by notifying the proper authorities when it first learned of them. It chose instead to secretly gather information in an effort to destroy a competitor. Certainly, the sword which Williams wields against Caprock has two edges, one of which repudiates Williams' actions in concealing facts from the Commission for its own private interests. If sanctions are to be enforced here, let them be enforced equally against all guilty parties.

WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that the petition to deny filed by Williams Broadcast Group against the above-captioned application be denied.

Respectfully submitted,

Law Offices  
JAMES L. OYSTER  
8315 Tobin Road  
Annandale, VA 22003-1101  
(703) 573-6765  
May 9, 1989

CAPROCK EDUCATIONAL  
BROADCASTING FOUNDATION

By   
James L. Oyster  
Counsel

MAILGRAM SERVICE CENTER  
MIDDLETOWN, VA. 22645  
10AM

Western Union Mailgram®



Exhibit 1

4-012068S100002 04/10/89 ICS IPMBNGZ CSP DALB  
1 2146601016 MGM TDBN GRAND PRAIRIE TX 04-10 1134A EST

LONE STAR SOFTWARE  
2100 HWY 360 STE 1204  
GRAND PRAIRIE TX 75050

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2146601016 MGMB TDBN GRAND PRAIRIE TX 61 04-10 1134A EST

ZIP

MR. DENNIS WILLIAMS

CHIEF OF FM DIVISION

FEDERAL COMMUNICATIONS COMMISSION

1919 M ST NW

WASHINGTON DC 20554

IN ACCORDANCE WITH THE CONSTRUCTION PERMIT ISSUED CAPROCK EDUCATIONAL  
BROADCASTING ON OCTOBER 16, 1987, CALL LETTERS KAMY, WE SHALL BEGIN  
BROADCASTING TODAY AT 1:00PM CDT ON 90.1 MHZ IN LUBBOCK, TEXAS.

T. KENT ATKINS, TRUSTEE

2100 HIGHWAY 360, SUITE 1204

GRAND PRAIRIE, TX 75050

11:34 EST

MGMCOMP

Declaration of T. Kent Atkins

T. Kent Atkins herewith submits his declaration in response to the Petition to Deny filed by Williams Broadcast Group ("Williams") against the application of Caprock Educational Broadcasting Foundation ("Caprock") for modification of construction permit of new FM station KAMY, Lubbock, TX. Mr. Atkins is a trustee of Caprock Educational Broadcasting

engineering for KJAK went to the construction site in mid-February, 1989, and saw the antenna mounted on the tower, together with a limiter in the transmitter building. The facts are that the antenna was not completed until mid-March nor was the limiter purchased in mid-March.

8. KAMY did begin testing of its ITA(Wilkinson) 1000B transmitter. The 10000 watt CCA transmitter was purchased from WFTT in Valdosta, GA some 12 months previously and was simply being stored in the transmitter building. The CCA has never been hooked up for any reason. It has no final tube, harmonic filter, or EIA flanges necessary for running the transmitter.

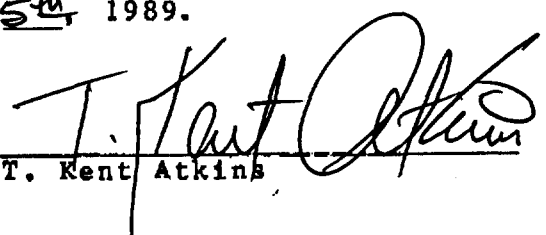
9. Caprock categorically denies that it ever operated above the requested power of 1.112 KW. The transformer taps on the 1000B ITA(Wilkinson) were set back to put a total of 256 watts of power out to the coaxial cable. With the length of coaxial cable and the eight bay antenna this would have made our maximum effective radiated power 1.112 KW requested from the Commission on July 28, 1988.

10. Williams states that they made informal tests and determined that KAMY was "putting out approximately 25,000 watts. It would

telegram to the Commission, notifying them of commencement of operations.

15. Caprock became aware that its construction was unauthorized following a call from Mr. Arthur Doak of the Commission who asked for information regarding the location and power of the KAMY facilities. Caprock called counsel regarding the request and to provide the information. It was at this time that counsel advised Caprock that it should not be operating until it received a grant of the modification application. Caprock immediately took the station off the air, and counsel advised Mr. Doak that the applicant had mistakenly commenced operation at the proposed location but had ceased operations immediately upon being notified of its mistake.

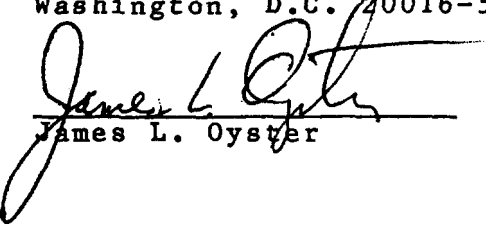
I declare under penalty of perjury that the foregoing is true and correct. Executed on May 5<sup>th</sup>, 1989.

  
T. Kent Atkins

CERTIFICATE OF SERVICE

James L. Oyster hereby certifies that he has sent a copy of the foregoing OPPOSITION TO PETITION TO DENY by first class U.S. mail, postage prepaid, or by hand delivery, on or before the 9th day of May, 1989 to the following:

John H. Midlen, Jr., Esq.  
P.O. Box 5662  
Washington, D.C. 20016-5662

  
James L. Oyster